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Supreme Court No. _____
(COA No. 55745-9-I)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

FILED
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CLERK OF SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WRIGHT,

Petitioner.

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CLERK OF APPELLATE COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Oliver Wright, the respondent below, asks this Court to review the Court of Appeals decision referred to in Section

B.

B. COURT OF APPEALS DECISION.

Pursuant to RAP 13.4(b), Mr. Wright seeks review of the Court of Appeal's published decision in *State v. Oliver Wright*, No. 55745-9-1, slip op. (Wash., Jan. 30, 2006). The opinion was filed on January 30, 2006, and is attached as Appendix A to this petition.

C. ISSUES PRESENTED FOR REVIEW.

1. Mr. Wright was originally charged with second degree murder in violation of RCW 9A.32.050(1) under both statutory alternatives, (a) second degree intentional murder and (b) second degree felony murder. The jury found Mr. Wright guilty of second degree felony murder, which was reversed in light of *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002). On remand, the trial judge precluded the State from re-filing second degree intentional murder charges, ruling double jeopardy prohibits the State from reprosecution of second degree intentional murder.

Did the trial court properly bar the State from proceeding on remand with second degree murder charges as barred on double jeopardy grounds?

2. When the State charges and places the defendant in jeopardy with one crime under two alternative theories and the first trial ended without a verdict on a theory for reasons of the prosecution's making, does double jeopardy bar retrial on the State's elected abandoned theory following reversal of the jury's verdict?

D. STATEMENT OF THE CASE.

1. Trial proceedings. On April 6, 1993, Oliver Wright and Benson Jones confronted Oscar Evans, and Wright and Evans were soon after each shot. CP 4-5. Evans died six hours later at Harborview Hospital in Seattle. CP 4.

The State charged Mr. Wright with second degree murder under both second degree intentional murder and second degree felony murder, as follows:

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse OLIVER MENARD WRIGHT of the crime of Murder in the Second Degree, committed as follows:

That the defendant OLIVER MENARD WRIGHT in King County, Washington on or about April 6, 1993, while

committing and attempting to commit the crime of Assault in the Second Degree, and in the course of and in furtherance of said crime and in the immediate flight therefrom, and with the intent to cause the death of another person, did cause the death of Jeff Oscar Evans, Jr., aka, Aisa Cameron, a human being, who was not a participant in said crime, and who died on or about April 6, 1993;

Contrary to RCW 9A.32.050(1)(a) and (b). . .

CP at 1.

Following the jury trial, the State proposed only a second degree felony murder jury instruction and the court instructed the jury on second degree felony murder. CP 21, 96. Mr. Wright was convicted of second degree felony murder. Slip op. at 2. Mr. Wright's felony murder conviction was later vacated by this Court as a petitioner in the consolidated cases of *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004). This Court remanded the case to the trial court for "further lawful proceedings. *Hinton*, 152 Wn.2d at 861.

On remand, the State re-filed an amended information, again charging Mr. Wright with second degree intentional murder. CP 127. Mr. Wright filed a motion to dismiss the amended information as barred by double jeopardy and mandatory joinder. CP 131-90.

The Honorable Judge Ronald Kessler agreed with Mr. Wright, ruling double jeopardy precludes the State from re-filing second degree intentional murder. 2/17/05RP at 16. Judge Kessler concluded,

Okay, I am still persuaded that the decision of the Court was correct with respect to the jeopardy issue. I don't see a constitutional distinction between modes and – separate modes and separate crimes. I also have a hard time distinguishing this from what occurred in *Hiscock* (phonetic) and so I will not permit the State to proceed with murder in the second – intentional murder in the second degree.

2/17/05RP at 16.

2. Argument on appeal. On appeal, the State argued double jeopardy does not apply because Mr. Wright's felony murder conviction was vacated and the jury never decided whether or not Mr. Wright was guilty of second degree intentional murder. Appellant's Opening Brief at pages 6-13. Mr. Wright responded jeopardy attached when the State charged him with both alternatives to second degree murder and Wright was put to trial on the two alternatives and terminated upon his conviction for felony murder. Respondent's Brief at 3-8. Furthermore, because the State's evidence as legally insufficient to prove him guilty of felony murder, double jeopardy bars on the same offense under another alternative theory. Respondent's Brief at 9-12. Mr. Wright also

argued double jeopardy barred the State from re-filing charges it charged and forced the defendant to defend himself against at trial, but somewhere abandoned during the trial and of its own choosing decided not to propose a jury instruction for the abandoned charge. Respondent's Brief at 16-19.

3. The Court of Appeals Decision. The Court of Appeals ruled since the original felony murder conviction was vacated upon Mr. Wright's behest in his personal restraint petition, the slate was wiped clean and the State can re-file charges. Slip op. at 4-5. The Court of Appeals disagreed that this Court's *Andress* stood for the proposition that the State presents legally insufficient evidence to prove felony murder when it attempts to prove felony murder with the predicate offense of second degree assault; therefore the appellate reversal was not tantamount to an acquittal under *Burks v. United States*.¹ Slip op. at 5. The Court of Appeals found that while federal caselaw prohibited reprosecution for charges the State choose to abandon at trial, the instant case was unique since there were "25 years of unbroken precedent established that felony murder predicated on assault was a sound and sufficient theory"

¹ 437 U.S. 1, 16, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

and failing to submit an intentional murder instruction was therefore not unreasonable. Slip op. at 9.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

Mr. Wright requests this Court grant review of his case pursuant to RAP 13.4 because under section (1) the Court of Appeals decision is in conflict with a Washington Supreme Court decision, *State v. Davis*, 190 Wash. 164, 166, 67 P.2d 894 (1937) (holding as a general rule supported by the great weight of authority, where an indictment or information contains two or more counts and the jury either convicts or acquits upon one and is silent as to the other, and the record does not show the reason for the discharge of the jury, the accused cannot again be put upon trial as to those counts); under section (2) the Court of Appeals decision is in conflict with other Court of Appeals decisions, such as *State v. Hescocock*, 98 Wn.App. 600, 604-05, 989 P.2d 1251 (1999) (holding an acquittal implied by conviction on a different theory of culpability precludes a second trial on alternate theory even when there is no verdict); the petition involves a significant question of law under the state and federal constitutions (RAP 13.4(b)(3)); and the petition involves an issue of substantial public interest warranting review by the State Supreme Court (RAP 13.4(b)(4)).

DOUBLE JEOPARDY PROHIBITS THE STATE FROM RE-FILING SECOND DEGREE MURDER CHARGES ON REMAND

1. Double jeopardy prohibits the State from trying Mr.

Wright twice for the same offense originally charged. The Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. 5; Wash. Const., art. 1, § 9. The Double Jeopardy Clause protects accused individuals from three distinct types of abuse by government:

- 1) a second prosecution for the same offense after acquittal;
- (2) a second prosecution for the same offense after conviction; and
- (3) multiple punishments for the same offense.

State v. Hescoek, 98 Wn.App. at 603-04; *North Carolina v. Pearce*, 295 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Former Justice Philip A. Talmadge stated,

Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong for a man to "be brought into danger for the same offense more than once." Few

principles have been more deeply "rooted in the traditions and conscience of our people."

Phillip Talmadge, Double Jeopardy: The Civil Forfeiture Debate, 19 Seattle Univ. L. R. 209, 209-210 (1996).

The United States Supreme Court has fully explained the rationale behind the Double Jeopardy Clause — the prevention of repeated prosecutions by the State until a conviction is obtained:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense...

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Jeopardy attaches once a jury is empanelled and sworn and is "put to trial;" the defendant need not show that the jury actually reached a verdict. *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L. Ed. 2d 24 (1978); *Serfass v. United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).

Of course, double jeopardy is not violated when a trial court properly declares a mistrial due to "manifest necessity." *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). But the mere failure of the jurors to make a required finding does

not meet that standard; the court must find that the jurors are “genuinely deadlocked” before it excuses them. *Id.* at 509.

“The Double Jeopardy Clause clearly bars the reprosecution of a criminal defendant on the same charges after a judgment of conviction or acquittal.” *Venson v. Georgia*, 74 F.3d 1140, 1145 (C.A.11, 1996), citing *United States v. Wilson*, 420 U.S. 332, 342-43, 95 S.Ct. 1013, 1021, 43 L.Ed.2d 232 (1975) (quoting *North Carolina v. Pearce*, 395 U.S. at 717). The jury's failure to make a finding has the same effect as an acquittal. *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L. Ed. 2d 199 (1957).

In *Green*, the jury found the defendant guilty of arson and second degree murder but failed to find him guilty or not guilty on the first degree murder charge – the verdict was simply silent on that charge. *Id.* at 186. The trial judge accepted the verdict, entered judgments, dismissed the jury, and did not declare a mistrial. *Id.* *Green* appealed and his conviction was overturned. On remand he was retried for first-degree murder and convicted. *Id.* The Supreme Court held that double jeopardy prohibited retrial on the first-degree murder charge even though the jury made no finding on that charge:

[I]t is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be charged again.

Id. at 188. The Court did not rely on the assumption that the jury implicitly acquitted Green of murder in the first degree:

Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implied acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent.

Green, 355 U.S. at 190-91 (internal citations omitted).

This case is similar to *Green*. At the first trial, the Court discharged the jury without any inquiry into why it had not returned a verdict on second degree intentional murder. There was no showing that the jury was hopelessly deadlocked. The Court never asked the jury whether it might be able to reach a verdict on that issue after further deliberations. The court never declared a

mistrial, and it certainly never obtained the defendant's consent to do so. Of course, had the court declared a mistrial, the State would have had only 60 days to proceed to retrial; it could not wait 12 years.

As such, when the jury found Mr. Wright guilty of second degree murder under the State's theory of felony murder, it acquitted him of second degree intentional murder. The State is now barred from re-filing that charge.

2. Remand upon a finding of insufficiency of the evidence acts as an acquittal and bars re-filing the original charges.

A reversal on appeal based on the State's failure to present sufficient evidence to convict a defendant of a charged crime acts as an acquittal and bars the State from re-filing the same charges:

Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only "just" remedy available for that court is the direction of a judgment of acquittal. To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled.

Burks v. United States, 437 U.S. 1, 17-18, 98 S.Ct. 2141, 57

L.Ed.2d 1 (1978). The Court found the only "just" remedy available for that court is the direction of a judgment of acquittal." *Burks*, 437

U.S. at 18. Accordingly, once a conviction is reversed because the reviewing court found the State's evidence legally insufficient to affirm a conviction, re prosecution is barred and a judgment of acquittal is required.

This Court has specifically found the State's evidence of an assault as a predicate crime for felony murder legally insufficient – as a matter of law, the State's evidence of assault as a predicate offense to felony murder was legally insufficient. *Andress*, 147 Wn.2d at 604. For purposes of double jeopardy, legal insufficiency is no different than factual insufficiency – and when a reviewing court reverses a conviction based on insufficiency of the evidence, it is deemed to be an acquittal because it “means that the government's case was so lacking that it should not have even been submitted to the jury.” *Burks*, 437 U.S. at 16. Accordingly, Mr. Wright's second degree murder conviction must be viewed as an acquittal because the State presented insufficient evidence Mr. Wright was guilty of second degree felony murder with the predicate offense of assault under *Andress*. *Burks*, 437 U.S. at 16. Following that reversal based on insufficiency of the evidence, the State was bared from re-filing the same second degree murder charge.

The Court of Appeals mistakenly makes a distinction between legal sufficiency and statutory construction, holding Mr. Wright's felony murder conviction was not reversed because it was legally insufficient under *Andress* (holding assault cannot be the predicate offense to second degree felony murder), but instead because he was convicted of a nonexistent crime. Slip op. at 5-6, citing *Montana v. Hall*, 481 U.S. 400, 107 S.Ct. 1825, 95 L.Ed.2d 354 (1987)(defendant erroneously convicted of incest under statute that did not go into effect until after date of crime; reversal did not bar retrial on charge of sexual assault under more general statute).

But the Court of Appeals' reliance on *Hall* is suspect to say the very least, since the holding in that case specifically states that the State should be allowed to re-file assault charges that it had originally charged and the only reason it changed its charging document to the not yet enacted incest statute was because the defendant himself request the prosecutor to amend the information to reflect the charge:

Montana originally sought to try respondent for sexual assault. At respondent's behest, Montana tried him instead for incest. In these circumstances, trial of respondent for sexual assault, after reversal of respondent's incest conviction on grounds unrelated to guilt or innocence, does not offend the Double Jeopardy Clause.

(Emphasis added.) *Montana v. Hall*, 481 U.S. at 403. Here, unlike the facts in *Hall*, Mr. Wright never insisted that the State charge him with a non-existent crime and recharging him with second degree intentional murder does offend the Double Jeopardy Clause.

In *State v. Hembd*, the Court held double jeopardy prohibits the State from re-filing charges after the conviction for a nonexistent crime is reversed on appeal. 197 Mont. 438, 643 P.2d 567 (1982). The defendant was charged with negligent arson, and the jury found the defendant guilty of “attempted misdemeanor negligent arson.” *Id.* at 439. The Montana Supreme Court first found that “attempted misdemeanor negligent arson” and “attempted felony negligent arson” (like felony murder based on assault in Washington) were nonexistent crimes. *Id.* The *Hembd* Court found the jury’s verdict on the nonexistent crime constituted an implied acquittal of the charged crimes of misdemeanor negligent arson and felony negligent arson. *Id.* Importantly, the Court held double jeopardy barred the State from retrying Mr. Hembd of the charged crimes. 197 Mont. at 439-40.

3. Double jeopardy also precludes the State from re-filing the same charge upon remand but under an alternative theory.

When a defendant is charged with two alternatives of committing a single crime, double jeopardy bars retrying the defendant after reversal on one alternative theory. In *State v. Hescoek*, the defendant was charged with forgery alleging two alternative means of committing the crime, RCW 9A.60.020(1)(a) and (b). 98 Wn.App. at 602. The defendant was found guilty of violating only section (1)(a). *Id.* Hescoek argued on appeal that the evidence was insufficient to support a conviction under (1)(a). The State agreed, but requested remand for a determination of whether Hescoek violated (1)(b). *Id.* at 603. Hescoek argued double jeopardy prevented remand for consideration of his culpability under the alternative section, (1)(b). *Id.* at 602.

The *Hescoek* Court ruled that an acquittal implied by conviction on a different theory of culpability precludes a second trial. 98 Wn.App. at 604-05. The trial court's written findings and conclusions of law were unambiguous as to the source of Hescoek's culpability. 98 Wn. App. at 602. While the Court noted that remand is appropriate where a defect is found in the written findings and is not based on the State's failure to prove its case, a

lack of written findings or conclusions of law on an alternative theory of culpability cannot justify remand for prosecution under that theory. *Hescock*, 98 Wn. App. at 607.

The Court of Appeals analysis of *Hescock* is misguided. In an attempt to somehow distinguish Mr. Wright's case from *Hescock*, the Court of Appeals opined in *Wright* the jury did not have a full opportunity to find him guilty of intentional murder, since that charge did not appear in the instructions. Slip op. at 7. But in *Hescock*, there was only a bench trial and the court found the juvenile guilty of committing forgery but the *Hescock* Court Ruled the State was barred from re-filing charges even when there was a lack of written findings or conclusions of law on the alternative theory of culpability. *Hescock*, 98 Wn. App. at 607.

This Court should follow the Montana Supreme Court and dismiss the action on remand. In *Broussard*, following the Court's determination that the State was barred from retrying the defendants due to an implied acquittal, the Court determined the defendants could not be tried again.

The People contend that appellants may still be retried for any offense of which they were not impliedly acquitted . . . while appellants maintain that the district attorney's failure to join such charges in the information precludes further prosecution for any offense arising from the same act.

Kellett v. Superior Court (1966) 63 Cal.2d 822, 827 [48 Cal.Rptr. 366, 409 P.2d 206], clearly and succinctly answers this question in analyzing applicable Penal Code sections 654 and 954. "[Where] ... the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." . . . The same considerations apply herein. The district attorney's failure to join any such offenses in the information operates as an absolute bar to further prosecution.

Also, Penal Code section 1023, and the proscription against double jeopardy precludes further prosecution of either appellant for any lesser included offense. In the ordinary situation where a defendant obtains reversal on appeal of his conviction, the reversal does not bar retrial for the same offense because jeopardy continues as to the offense of which he was convicted. (*United States v. Ball* (1896) 163 U.S. 662 [41 L.Ed. 300, 16 S.Ct. 1192].) In the present case, however, retrial of appellants for the offense of which they were convicted is impossible as no such crime exists. Yet there can be no question that appellants have already been put once in jeopardy for the crime of attempted murder. We must therefore conclude that under the plain terms of section 1023, appellants may not now be prosecuted for a lesser included offense therein.

76 Cal.App. at 198-200. The *Broussard* Court reversed the judgments and gave the trial court instructions to dismiss the action. *Id.* at 199.

4. The State must be precluded from pursuing a charge it abandoned during Mr. Wright's first trial. Lastly, the State is barred from reprosecuting a defendant on a theory it abandoned at trial.

In *Sizemore v. Fletcher*, 921 F.2d 667, 673 (6th Cir.1990), the court ruled that a second trial may be "barred by double jeopardy" if "the first trial ended without a verdict for reasons of the prosecution's making." Similarly, in *Saylor v. Cornelius*, 845 F.2d 1401, 1403, 1408 (6th Cir.1988), the Court held,

where the first trial ended without a verdict on the relevant charge for reasons of the prosecution's making, a retrial on that charge would violate the protection the Double Jeopardy Clause affords against harassing reprosecution.... We believe that the Double Jeopardy Clause forbids a second trial on [an alternative] theory because such a trial would be vexatious, regardless of the outcome of the jury's deliberation on the theory charged to it. It would be vexatious because the defendant underwent the jeopardy of a full trial, which is even more vexatious than the aborted or partial trials usually involved in double jeopardy cases, and the trial failed to terminate in a verdict for reasons that cannot fairly be charged to the defendant.

For reasons known only to the prosecutor, he elected not to pursue its intentional murder theory at trial.² The choice was not Mr. Wright's. The prosecution only proposed jury instructions for second degree felony murder and not intentional second degree

² In the instant case, the Certification for Determination of Probable Cause states that Mr. Wright told Evans that he was a Crip gang member and that he was going to shoot Evans. A witness testified that while Evans was telling Wright that he was only there to spend some money, Wright loaded his gun. Moments later, a witness testified that Wright fired three shots in rapid succession. Wright dropped Evans to the ground and drove off with his co-defendant Jones. CP at 1-4.

murder. CP 21. The prosecution's abandonment of its theory of intentional second degree murder can be viewed as the State's admission insufficient evidence existed to support the alternative of intentional murder. Protection from double jeopardy bars retrial when insufficient evidence supports the charge. *Burks*, 437 U.S. at 10-11. Accordingly, the State is now precluded on double jeopardy grounds from retrying Mr. Wright on a theory it abandoned during trial. *Sizemore v. Fletcher*, 921 F.2d at 673; *Cornelius*, 845 F.2d at 1403, 1408.

In *State v. Davis*, the jury returned a verdict of not guilty on count I (vehicular homicide) and did not return verdicts as to counts II (driving while intoxicated) or count III (reckless driving). 190 Wash. 164, 67 P.2d 894 (1937). The record showed that the jury foreman told the court a "verdict had been reached on count one, but the jurors could not agree upon verdict on counts two and three," and the court discharged the jury without explanation. *Id.* at 165. The defendant then moved to dismiss counts two and three because double jeopardy barred retrial. The court granted the motion to dismiss and the State appealed. *Id.* In affirming the motion to dismiss, this Court observed:

[as] a general rule supported by the great weight of authority...where an indictment or information contains two or more counts and the jury either convicts or acquits upon one and is silent as to the other, and the record does not show the reason for the discharge of the jury, the accused cannot again be tried as to those counts.

Davis, 190 Wash. at 166.

In the instant case, the jury was silent on the intentional murder charge and the record does not show the reason for the discharge of the jury on that charge. Therefore, constitutional prohibitions on double jeopardy prevent the State from again placing Mr. Wright in jeopardy for the same charge. *Id.*

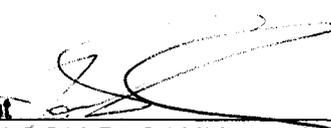
F. CONCLUSION.

For the reasons stated above, Mr. Wright respectfully requests this Court grant his petition for review. Because the trial court properly precluded the State from re-filing second degree intentional murder charges, this Court should reverse the Court of Appeals decision and remand for further lawful proceedings.

DATED this 1st day of March, 2006.

Respectfully submitted,

Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.


JASON B. SAUNDERS (24963)
Washington Appellate Project (91052)
Attorneys for Petitioner

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name _____

MAR - 1 2006
Date _____

Done in Seattle, Washington

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RECEIVED

JAN 30 2006

Washington Appellate Project

STATE OF WASHINGTON,)	NO. 55745-9-I
)	
Appellant,)	
)	
v.)	PUBLISHED OPINION
)	
OLIVER WRIGHT,)	
)	
Respondent.)	FILED: JANUARY 30, 2006

BECKER, J. -- The State seeks to retry, on the charge of second degree intentional murder, a defendant whose felony murder conviction was vacated under In Re Andress¹ because it was for a then nonexistent crime. The charge of intentional murder was left undecided in the first trial because neither the State nor the defendant asked to have it submitted in the instructions to the jury. Because the defendant has not been acquitted of the murder, and he has obtained a reversal of his first conviction for a reason other than insufficient evidence, he remains in the same jeopardy that attached during the first trial. The

¹ In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

order dismissing the second prosecution on double jeopardy grounds is reversed.

FACTS

A man was shot dead in the street in Seattle in April 1993 in the course of an argument associated with a drug transaction. The State identified Oliver Wright as the shooter, and charged him with a single count of second degree murder. The information also charged Wright with committing three counts of assault and robbery against different victims three days earlier. The information alleged the count of murder by alternative means: felony murder predicated upon second-degree assault, and intentional murder. The case went to trial later that year. At the end of the trial, both parties submitted felony murder instructions. No one proposed an instruction on intentional murder. On the charge of murder, the court instructed the jury only on felony murder. The jury found Wright guilty of felony murder, and guilty on the assault and robbery charges as well. He went to prison on a 534-month standard range sentence. His conviction was affirmed on direct appeal.

Some years later, the Washington Supreme Court interpreted the former felony murder statute, RCW 9A.32.050, and decided that the Legislature did not intend for assault to serve as a predicate felony for second degree felony murder. In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). Along with others situated similarly to the petitioner in Andress, Wright petitioned for relief from his conviction. The Supreme Court held that the petitioners were

entitled to relief because they had been convicted of a nonexistent crime. In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). The Court vacated the convictions and remanded for further proceedings.

The State then renewed its prosecution of Wright for the 1993 homicide by amending the information so that the murder count alleged only second degree intentional murder. Wright moved to dismiss the charge as barred by double jeopardy. The trial court granted that motion. The State appeals.

ANALYSIS

“No person shall...be subject for the same offense to be twice put in jeopardy of life or limb”. U.S. Const. amend. V.²

The guarantee of the double jeopardy clause consists of three separate constitutional protections. “It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). There is no issue of multiple punishments in this case. The issue is successive prosecution.

² The Washington State Constitution, article 1, § 9, makes a similar guarantee: “No person shall...be twice put in jeopardy for the same offense”. No issue has been raised as to the possibility of an interpretation of the State Constitution that would differ from the United States Constitution in these circumstances.

The law "attaches particular significance to an acquittal." United States v. Scott, 437 U.S. 82, 91, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978). A verdict of acquittal ends a defendant's jeopardy for that offense and bars reprosecution for the same offense even if it is not reduced to judgment and even if it appears to be erroneous. Green v. United States, 355 U.S. 184, 188, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1967); Scott, 437 U.S. at 91.

A conviction, on the other hand, does not necessarily act as a bar to a second prosecution for the same offense, for "it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted." United States v. Ball, 163 U.S. 662, 672, 16 S. Ct. 1192, 41 L. Ed. 300 (1896). The Ball case "effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course." Price v. Georgia, 398 U.S. 323, 326, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970). "When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." Burks v. United States, 437 U.S. 1, 15, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). The practice of retrial after reversal "serves defendants' rights as well as society's interest" because appellate courts would be less zealous in rooting out error "if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." United States v. Tateo, 377 U.S. 463,

466, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964). The rationale for retrial "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." North Carolina v. Pearce, 395 U.S. at 721.

There can be no retrial, however, when the reason the appellate court reverses a conviction is insufficiency of the evidence. An appellate reversal for insufficient evidence is deemed to be an acquittal with the same effect as a verdict of acquittal because it "means that the government's case was so lacking that it should not have even been submitted to the jury." Burks, 437 U.S. at 16.

Wright contends that the appellate reversal of his murder conviction was equivalent to an acquittal. First, he argues that felony murder convictions predicated on assault under the former statute are, according to Andress, based on legally insufficient evidence. This argument lacks merit. To determine whether insufficiency of the evidence was the reason why Wright's conviction was set aside, we look to the rationale of the reversing court. See Parker v. Norris, 64 F.3d 1178, 1182 (8th Cir. 1995). Nowhere in Andress did the Supreme Court adopt or imply a rationale of evidentiary insufficiency. Rather, the Court engaged in statutory construction and concluded that Andress had been convicted of a nonexistent crime. See Hinton, 152 Wn.2d at 857. The problem of conviction for a nonexistent crime is not a failure of proof. Montana v. Hall, 481 U.S. 400, 107 S. Ct. 1825, 95 L. Ed. 2d 354 (1987) (defendant was erroneously convicted of incest under a statute that did not go into effect until

after the date of the crime; reversal did not bar retrial on a charge of sexual assault under a more general statute).

Wright next argues that the 1993 jury, by finding him guilty of only felony murder, implicitly acquitted him on the alternative charge of intentional murder. In Green, on which Wright principally relies, the government tried the defendant on charges of arson and murder. On the murder count, the instructions gave the jury the choice of first or second degree murder. The jury found the defendant guilty of second degree murder. Their verdict was silent on the charge of first degree murder. The second degree murder conviction was reversed on appeal as unsupported by the evidence. The government reprosecuted Green for first degree murder and obtained a conviction. Green asserted former jeopardy, based not on his prior conviction, but on a theory of prior acquittal. He argued that the original jury's "refusal" to convict him of first degree murder was the same as an acquittal. See Green, 355 U.S. at 190 n.11. The Supreme Court, reversing on double jeopardy grounds, agreed that the first jury's verdict was an "implicit acquittal" on the charge of first degree murder.

Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder.

Green, 355 U.S. at 190.

It was critical to the rationale in Green that the first jury "was given a full opportunity to return a verdict" on the charge of first degree murder. Green, 355 U.S. at 191; Price v. Georgia, 398 U.S. at 329. A Washington case in the vein of Green is State v. Hescock, 98 Wn. App. 600, 989 P.2d 1251 (1999). After a bench trial, the court found a juvenile guilty of only one out of two charged alternative means of committing forgery. This court, after reversing that conviction for insufficient evidence, held that double jeopardy barred retrial on the other means as well because, as in Green, the trier of fact had not found the defendant guilty on that charge despite having a full opportunity to do so. Hescock, 98 Wn. App. At 611.

Wright's case differs materially from Green and Hescock in that the jury in Wright's trial did not have a full opportunity to find him guilty of intentional murder. The charge did not appear in the instructions. It simply dropped from the case. It cannot be said that the jury refused to convict him of intentional murder. That choice was not available. We therefore conclude the 1993 verdict was not an implicit acquittal as that concept is defined in Green and applied in Hescock, and it did not terminate Wright's jeopardy on the charge of intentional second degree murder.

As an alternative to his theory of former jeopardy based on an implied acquittal, or perhaps as a variation of that theory, Wright contends that the Double Jeopardy Clause prevents the State from pursuing a charge on which there has never been a decision to acquit or convict because the State

abandoned the charge during the first trial. For this analysis, he relies on Saylor v. Cornelius, 845 F.2d 1401 (6th Cir. 1988).

Saylor is similar in that the defendant was charged with one count of murder, committed either by conspiracy or as an accomplice. The jury convicted him of conspiracy, the only theory submitted by the instructions. The conspiracy conviction was reversed for insufficiency of the evidence. The State then sought to retry the defendant as an accomplice. It was undisputed that the record contained sufficient evidence to convict the defendant as an accomplice. Nevertheless, the Sixth Circuit granted the defendant's petition to bar the retrial, reasoning that his jeopardy as an alleged accomplice terminated because "the first trial ended without a verdict on the relevant charge for reasons of the prosecution's making":

The accomplice theory of liability was charged in the indictment, was relevant to the evidence presented during the trial, and most importantly, up until the time the jury returned from its deliberations and announced its verdict, could have been presented to the jury. Under circumstances such as these, where the first trial ended without a verdict on the relevant charge for reasons of the prosecution's making, a retrial on that charge would violate the protection the Double Jeopardy Clause affords against harassing re prosecution.

Saylor, 845 F.2d at 1403.

Saylor has been found inapplicable in another state court on facts very similar to Wright's case. See People v. Daniels, 187 Ill. 2d 301, 718 N.E.2d 149 (1999) (having charged defendant with both intentional and felony murder, State submitted only intentional murder instruction; intentional murder conviction

reversed for trial error; State allowed to retry on both means). And a more recent decision by the Sixth Circuit distinguishes Saylor while retreating from it. United States v. Davis, 873 F.2d 900 (6th Cir. 1989). The prosecutor in Davis is described as having made a reasonable decision to proceed on a theory that appeared legally sound at the time, unlike the prosecutor in Saylor who is seen as having irrationally acquiesced to instructions on the one theory for which there was no evidence. Davis, 873 F.2d at 905.

If the Saylor analysis is correct in focusing on the prosecution's possibly illegitimate reasons for failing to submit the instruction as the essential justification for barring a second trial, Wright's case is distinguishable on the same basis as Davis. At the time the State allowed its case against Wright to go to the jury with only a felony murder instruction, 25 years of unbroken precedent established that felony murder predicated on assault was a sound and sufficient theory. Failing to submit an intentional murder instruction was not unreasonable.

However, we find Saylor not only distinguishable but also unpersuasive in its legal reasoning because it is not solidly tethered to the precedents it cites.³

Saylor first invokes Green for its condemnation of successive prosecutions as vexatious:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to

³ This was also the view of District Court Judge Kinneary in the Davis case. See United States v. Davis, 714 F. Supp. 853, 857-862 (S.D. Ohio (1988)).

embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green, 355 U.S. at 187-88, quoted in Saylor, 845 F.2d at 1406. But Green, an implied acquittal case, does not lay down a general rule protecting against all successive prosecutions, and it does not specifically address the problem of a theory that is charged but not submitted for decision.

Saylor looks to Scott to show "what result the Double Jeopardy Clause requires when a trial ends without a final determination of the defendant's guilt or innocence on a charge contained in the indictment but not presented to the jury." Saylor, 845 F.2d at 1406. According to Saylor, Scott makes a distinction "between trials aborted as a result of the defendant's deliberate election and those ending as a result of the prosecution's action." Saylor, 845 F.2d at 1407. The prosecution should "bear the burden of the aborted outcome" if the omission of the charge from the jury instructions is attributable to the prosecution rather than to the deliberate election of the defendant. Saylor, 845 F.2d at 1407. Scott supports only part of this reasoning. Scott holds that double jeopardy does not bar retrial when it is the defendant who requests that a charge be left unresolved at the first trial (defendant Scott was "neither acquitted nor convicted, because he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury which had been empanelled to try him."). Scott, 437 U.S. at 99. Scott does not hold that double jeopardy bars retrial when a

charge is left unresolved at the first trial for some reason attributable to the prosecution.

Saylor concludes, citing a law review article, that retrial is barred even if the action by the prosecutor that prevents the first jury from reaching a decision is due to mere absent-mindedness. Saylor, 845 F. 2d at 1408. This is too broadly stated, for as the cited law review article acknowledges, in a case of mistrial declared due to prosecutorial misconduct, double jeopardy bars reprosecution only if the prosecutor precipitated the mistrial intentionally. Notes and Comments, Twice in Jeopardy, 75 Yale L.J. 262, 287 and n.123, cited in Saylor, 845 F.2d at 1408. See also Oregon v. Kennedy, 456 U.S. 663, 677, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982). The law review author had in mind the very different facts of Downum v. United States, 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963). At the first trial in Downum, after the jury was selected and sworn, the prosecutor failed to have on hand a witness needed for two out of the six charged counts. Over defense objection the trial court refused to proceed on the four remaining counts, and discharged the jury. A second jury, empanelled two days later despite the defendant's plea of former jeopardy, convicted the defendant. The Supreme Court reversed, reasoning that the prosecutor had entered upon the first trial without sufficient evidence to convict. Downum, 372 U.S. at 737.

Although Wright does not cite Downum, he echoes its reasoning when he theorizes that the State's failure to propose a jury instruction on intentional

murder at the first trial may have been a deliberate choice to abandon that charge for lack of evidence to support it.⁴

Unlike in Downum, the record of Wright's trial does not allow even an inference that the State entered upon the case without sufficient evidence. An eyewitness testified that Wright put his arm around the victim and shot him several times at close range. This testimony was sufficient to convict Wright on either of the charged alternative means of second degree murder. Far from attempting to deprive Wright of a determination by the first jury, the State proceeded with the first jury and obtained a conviction.

If the first jury had acquitted Wright of felony murder, double jeopardy would bar a second prosecution on a theory of intentional murder whether it had been previously charged or not. The fact that Wright was not acquitted is what truly explains why he does not deserve the same outcome on appeal as the defendant in Saylor. The result obtained at trial in Saylor was actually an acquittal, not a conviction, because on appeal it was found to be based on insufficient evidence. A conviction, on the other hand, bars a retrial only if it becomes unconditionally final. When the conviction is reversed on procedural or technical grounds – as it was here, as well as in Daniels, the Illinois case – the

⁴ According to the law review article, Downum can be read as holding that doubts will be resolved in favor of the liberty of the citizen "where the actions of the state may have been designed to deprive the defendant of a determination by the initial jury and were not simply the result of negligence". Notes and Comments, Twice in Jeopardy, 75 Yale L.J. at 287 n.123.

first trial has not yet run its full course, and the accused remains in initial jeopardy. He “may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted.” Ball, 163 U.S. at 672.

Our conclusion that Wright remains in initial jeopardy for the accusation he faced during the first trial is not inconsistent with a Texas case Wright has submitted as supplemental authority. Lewis v. State, 889 S.W.2d 403 (Tex. App. 1994). Wright cites Lewis for the proposition that the abandonment of an accusation during trial amounts to an acquittal that bars later trial for the same offense. Lewis, 889 S.W.2d at 409.

As a general rule, Texas holds that in order to preserve a portion of a charging instrument for a later trial, the State must obtain permission from the trial judge to dismiss, waive or abandon that portion of the charging instrument before jeopardy attaches. The Double Jeopardy Clause does not permit “constructive abandonment” of a portion of the charging instrument. Ex parte Preston, 833 S.W.2d 515, 518 (Tex. Crim. App. 1992) (where State alleged three counts of robbery but submitted only one to the jury, and the conviction on that count was not appealed, State not permitted to retry on the two abandoned counts). But the general rule applies only if the State obtains a valid conviction in the first trial. “Although not necessarily articulated the reason for that rule is that when the State obtains a conviction for one offense out of two or more alleged in a single indictment, jeopardy has been terminated.” Ex parte McAfee, 761

S.W.2d 771, 773 (Tex. Crim. App. 1988). Texas recognizes, as we do, that jeopardy has not terminated when criminal proceedings against an accused have not run their full course. McAfee, 761 S.W.2d at 773, Under McAfee and Lewis, as well as Ball, Wright's jeopardy on the single count of murder has not terminated because his conviction was reversed. This result is unaffected by the State's failure to formally preserve the intentional murder theory for a later trial.

In summary, Wright has never been acquitted, not even implicitly, for the 1993 murder. Now that he has obtained vacation of his second degree murder conviction based upon that killing, traditional double jeopardy analysis holds that the slate is wiped clean. The State may try again to establish his culpability. Under the Double Jeopardy Clause, the State's failure to request an intentional murder instruction in Wright's 1993 trial has no effect on the State's ability to proceed on that alternative now.

Aside from his double jeopardy argument, Wright also invokes the protection supplied by the court rules on mandatory joinder and speedy trial. The joinder rule, CrR 4.3.1, is a rule of pretrial procedure mandating consolidation of related offenses for trial. CrR 4.3.1(b)(3), the rule cited by Wright below, permits dismissal of a charge when a defendant has already been tried for a related offense. The State claims that Wright waived his remedy under CrR 4.3.1(b)(3) when, at the first trial, he did not move for "consolidation" of the intentional murder charge with the felony murder charge.

But the problem is not lack of pretrial consolidation of related offenses. The problem is that only one of the consolidated offenses was submitted to the jury for deliberation. We are not inclined to stretch the mandatory joinder rule and its waiver exception to cover an end-of-trial problem, as it does not appear the rule was intended to govern anything but pretrial procedure.

In a situation where the mandatory joinder rule clearly does apply, this court has already held that the “ends of justice” exception to CrR 4.3.1(b)(3) permits the State to bring new charges of manslaughter against a defendant whose felony murder conviction was vacated as the result of Andress. State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004).⁵ If CrR 4.3.1(b)(3) did apply in Wright’s situation, we would follow Ramos and hold that dismissal of the intentional murder charge would defeat the ends of justice.

The speedy trial rule, CrR 3.3, sets strict time limits within which the State must bring a defendant to trial on a pending charge. Wright’s claim of a speedy trial violation depends on his premise that the time for trial on the intentional murder charge began to run back in 1993 at the time of his original arraignment.

⁵ Wright misreads State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004), when he claims it also stands generally for the proposition that double jeopardy prohibits refiling murder charges on remand following Andress. He quotes one sentence on this subject in Ramos: “Double jeopardy prohibits retrial on the original charges.” Ramos, 124 Wn. App. at 338. The sentence refers to the particular facts in Ramos. The “original charges” against both defendants were charges of first-degree murder. Ramos, 124 Wn. App. At 336. They were convicted of second degree felony murder as a lesser included offense. Double jeopardy barred retrial for first degree murder because the jury verdict acquitted them on that charge both explicitly and implicitly.

But the time for trial calculation begins anew when an appellate court issues a mandate, or an order terminating a collateral proceeding such as Wright's. CrR 3.3(c)(2)(iv) and (v). And the computation of allowable time for trial of a pending charge "shall apply equally to all related charges." CrR 3.3(a)(5). Thus, the time for trial on the renewed prosecution for intentional murder charge began to run at the time of the order dismissing Wright's conviction for the related offense of felony murder. Wright's speedy trial argument is unfounded.

The order dismissing the second prosecution for intentional murder is reversed.

WE CONCUR:

COX, CJ

Becker, J.
Columan, J.